BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

FORTUNATO S. MUNOZ	)	
Claimant	)	
	)	
VS.	)	
	)	
IBP, INC.	)	
Self-Insured Respondent	)	Docket Nos. 245,483 & 253,417

ORDER

Claimant requested review of the December 1, 2003 Award by Administrative Law Judge (ALJ) Brad E. Avery. The Appeals Board (Board) heard oral argument on May 11, 2004.

APPEARANCES

Stanley R. Ausemus, of Emporia, Kansas, appeared for the claimant. Gregory D. Worth, of Roeland Park, Kansas, appeared for self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. In addition, at oral argument the parties acknowledged a numerical error within the ALJ's award on the issue of wage and total compensation paid. Both parties agreed that claimant's average weekly wage, without fringe benefits, was $420.70 and that temporary total disability benefits were paid over a period of 3.86 weeks at a rate of $280.48 per week for a total sum of $1,082.65.

ISSUES

The ALJ found claimant sustained a 16 percent permanent partial impairment to the whole body as a result of his May 4, 2000 compensable injury.[1] In addition, the ALJ granted claimant a 35.75 percent work disability, under K.S.A. 44-510e(a), after concluding claimant sustained a 34 percent wage loss and a 37.5 percent task loss. The wage loss reflects an imputed wage as the ALJ concluded that even though claimant had consistently applied for

[1] This date of accident was the subject of a stipulation and apparently does not reflect any actual date of an acute onset of injury in either docket number. The date is merely one provided to the ALJ for convenience.

jobs within respondent's plant and elsewhere in the community at least up until October 2002, claimant had refused to take advantage of the vocational and educational assistance offered by respondent. As such, he failed to establish a good faith effort to secure appropriate employment.

The claimant requests review of the ALJ's award claiming it is contrary to the evidence contained within the record. Specifically, claimant argues he is entitled to have his functional impairment increased to a minimum of 22%, and is further entitled to work disability that reflects his actual 100 percent wage loss.

Respondent contends this case represents a claim for two functional impairments arising out of two separate dates of injuries rather than a single claim for work disability benefits. Simply put, respondent argues that a third and subsequent injury which occurred while claimant was performing a regular duty job and which was the subject of an entirely separate claim and docket number was resolved by the parties on the same date the pending claims were tried to the ALJ. The restriction that arose out of that injury is, in respondent's view, the restriction that prevented respondent from accommodating claimant and returning him to the workplace. Accordingly, claimant is not entitled to work disability benefits under K.S.A. 44-510e(a), but is limited to his functional impairment, 16 percent to the body as a whole, as a result of his work related injuries.

The sole issue to be determined in this appeal is the nature and extent of claimant's impairment, both functional impairment and work disability, if any. In particular, the Board must consider whether the ALJ appropriately imputed a wage to claimant under these facts and circumstances.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant was employed by respondent as a production worker in its meat processing plant. Claimant's primary task was to cut out veins from the cattle carcasses as they were moved past his station. On April 22, 1999, claimant reported upper back complaints. He testified this injury also involved his right arm and rib cage. These complaints form the basis for Docket No. 245,483. An occupational physician first evaluated claimant and referred claimant to Dr. Vito J. Carabetta.

Dr. Carabetta diagnosed a sub-acute thoracic sprain due to claimant's work.[2] He treated claimant conservatively with medication and physical therapy. Eventually Dr. Carabetta provided injections which gave claimant some relief. By December 13, 1999, claimant reached maximum medical improvement and was released to return to work.[3] Dr. Carabetta provided permanent restrictions which respondent was able to accommodate. Claimant was reassigned to a job called "clean brisket bones" where he apparently worked uneventfully until February 2000.

In February 2000, claimant was lifting a box of meat and experienced an acute onset of low back pain and complaints of radiating pain in his left leg. This event forms the basis for Docket No. 253,417. Claimant was referred to Dr. Carabetta who again evaluated him, and diagnosed a lumbosacral injury with a possible herniated disc.[4] Dr. Carabetta treated claimant conservatively until July 12, 2000. At that time, claimant was found to be at maximum medical improvement.[5] Dr. Carabetta imposed permanent restrictions that were accommodated and claimant was assigned to a job removing meat from a conveyor belt.

Dr. Carabetta was asked to provide a permanent impairment relative to these two work-related injuries. He testified that the April 1999 injury resulted in a 5 percent permanent partial impairment to the body as a whole based upon the category DRE II findings set forth in the A.M.A. *Guides to the Evaluation of Permanent Impairment,* 4th ed. *(Guides)*.[6] He also assigned an additional 10 percent based on the DRE III findings, again as set forth in the *Guides* for claimant's lumbar complaints and radiculopathy.

After Dr. Carabetta's release, claimant asserted complaints of pain in his right hand and wrist. These complaints form the basis for Docket No. 259,787. Claimant was referred to Dr. Eyster for treatment. Dr. Eyster saw claimant on April 16, 2001 and following diagnostic tests, he diagnosed right carpal tunnel syndrome and acromioclavicular arthritis in the left shoulder. Claimant underwent surgery on May 2, 2001 to his right wrist. Claimant was released to return to work on July 18, 2001. Dr. Eyster imposed permanent restrictions that included no repetitive use for the right hand and no over the shoulder lifting, carrying or reaching on the left.[7] According to the letter dated July 5, 2001 sent to Dr. Eyster from Melissa Moss, the medical manager for respondent, claimant had already received a

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[2] Carabetta Depo. at 5.

[3] *Id.* at 14.

[4] *Id.* at 19.

[5] *Id.* at 22-23.

[6] All references are to the 4th edition of the *Guides* unless otherwise noted.

[7] Eyster Depo., Ex. 2 at 1.

permanent restriction for no overhead work on his left side before Dr. Eyster rendered his own restrictions.[8]

Dr. Eyster testified that the prohibition against repetitive use was due to the carpal tunnel syndrome on the right. He rated that condition at 3 percent of the right upper extremity based upon the *Guides*. Dr. Eyster explained that the restriction against lifting, carrying or reaching on the left was due to the degenerative condition in claimant's left shoulder. He provided no rating for that body member nor was there any testimony from him as to the causative nature of that condition.

Upon receipt of Dr. Eyster's restrictions on July 18, 2001, claimant was placed on light duty and advised that respondent could no longer accommodate his physical limitations. Consistent with respondent's policies, claimant was given 30 days in which to locate alternative placement within the plant. At the expiration of that period, he was terminated although he had the right to bid on jobs as they became available during the next 12 months.

Claimant testified that he regularly came to the plant and applied for open positions. His efforts in this respect have been acknowledged as "diligent" by Arturo Tabares, the Human Resources Manager for the plant.[9] On several occasions, claimant testified that he was told he would receive the job but upon appearing at the plant, he was told he was not given the job. Respondent maintains any jobs claimant might have been qualified for based upon his restrictions were not awarded to him because others with seniority bid on the same jobs.[10]

In addition to bidding on jobs within respondent's plant, claimant also made some effort to secure employment within his own community. Claimant, however, does not read or write either English or Spanish and speaks no English. His attorney provided staff who would fill out the employment applications for him and then claimant would return them to the prospective employer. Claimant offered approximately 10 applications with the last dated October 2002 as evidence of his effort to locate employment. Since that time, he relocated to live with his son. As of the Regular Hearing, claimant had obtained only sporadic temporary jobs through a temporary placement agency and has made $6 per hour.

In addition to his own efforts, respondent retained Dan R. Zumalt, a vocational counselor, to assist claimant in his efforts to locate employment. Mr. Zumalt reviewed claimant's vocational background, which included jobs as a painter, waiter, delivery person,

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[8] *Id.*

[9] Tabares Depo. at 22.

[10] Brownrigg Depo. at 11.

office janitor and production worker within a beef production facility. With the aid of Karen Terrill, another vocational counselor within the same office, a list of 35 tasks and a labor market survey was created, and Mr. Zumalt developed a plan to assist claimant. The plan was submitted to claimant's counsel but remained unsigned. This plan required claimant to make as many as 15 job contacts each week and to attend classes to learn to speak English. After one failed attempt to meet to discuss a rehabilitation plan, claimant elected to refuse any further assistance from Mr. Zumalt.

Mr. Zumalt testified that he believed claimant was capable of obtaining work earning a wage of $279.20 per week performing janitorial work. This figure is an average of the full time janitorial jobs available in the Emporia labor market based upon Mr. Zumalts' own labor market survey.

Claimant also met with Jim Molski, another vocational rehabilitation specialist, who testified that claimant had performed 25 individual job tasks within the last 15 years. Mr. Molski testified that claimant voiced concerns about his ability to lift and perform work in any meaningful fashion, even given Dr. Murati's opinions. Nonetheless, Mr. Molski indicated that claimant retained the capacity to earn $5.50 to $6.00 per hour in the open labor market given claimant's limited skills.[11] At the time Mr. Molski interviewed him, claimant was not actively searching for employment, nor is there evidence he was actively looking at the time of the Regular Hearing.

At his counsel's request, claimant was evaluated by Dr. Pedro A. Murati for purposes of assigning restrictions, an impairment rating and establishing task loss for work disability in his pending workers compensation claims. Dr. Murati first saw claimant on July 26, 2000. At that point, claimant's complaints were low back pain secondary to left SI radiculopathy and joint dysfunction, bilateral shoulder and rotator cuff strain.[12] There was a second examination on September 6, 2001. The complaints at that visit were constant low back pain, bilateral shoulder complaints, radiating pain into his neck and post-carpal tunnel release right wrist pain and numbness.[13]

Dr. Murati assigned a 22 percent whole body permanent impairment for claimant's work-related injuries. This rating is comprised of 10 percent permanent impairment to the body as a whole for lumbar complaints, 10 percent to the right upper extremity for carpal tunnel complaints, 7 percent to the right shoulder and 6 percent to the left shoulder.[14] It is

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[11] Molski Depo. at 26.

[12] Murati Depo. (Mar. 29, 2002) at 6.

[13] *Id.* at 8.

[14] *Id.*, Ex. 2, at 4.

worth noting that Dr. Murati's rating includes impairment for right carpal tunnel syndrome which is not the subject of this claim.[15]

Dr. Murati assigned a significant series of restrictions which, when considered in light of Mr. Molski's list, results in a task loss of 13 of the 25 tasks. This yields a 49 percent task loss. When asked to consider Ms. Terrill's task analysis, he testified claimant has lost the ability to perform 7 of the 35 tasks, a 20 percent loss.

Dr. Carabetta, the treating physician, was also asked to comment on claimant's task loss. Dr. Carabetta reviewed both task lists and opined claimant lost the ability to perform 6 of 35 tasks (Zumalt's list) and 11 of 25 tasks (Molski's list).

The ALJ appointed Dr. Peter Bieri to perform an independent medical examination pursuant to K.S.A. 44-510e in November 2000. Claimant gave Dr. Bieri a history of two separate and distinct injuries, one in April 1999 and another in February 2000. According to claimant, the first accident gave rise to complaints in claimant's right wrist and upper extremity and to the left shoulder. Dr. Bieri diagnosed possible carpal tunnel in the right wrist, and probable left rotator cuff strain.[16] As of the time of this evaluation, the right shoulder was normal in all respects, with acceptable range of motion and strength.

Claimant then described his second accident and complained of low back pain which radiated into his left lower extremity. Dr. Bieri noted a protrusion of the disc at the L5-S1 level with possible mild clinical radiculopathy.[17]

Dr. Bieri assigned the following impairments relating to these two accidental injuries: 5 percent permanent partial impairment to the right upper extremity for residual right tenosynovitis; 3 percent permanent impairment to the left shoulder for range of motion deficits and 3 percent permanent impairment for specific disorders of the left shoulder; 7 percent permanent impairment to the body as a whole for the lumbar spine plus another 2 percent for range of motion deficits to the lumbar spine. The combined total impairment for each of these condition is 16 percent permanent partial impairment to the whole body as a result of the claimant's compensable injuries.[18] The right shoulder was not rated during this examination.

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[15] As indicated before, Docket No. 259,787 was resolved and is not the focus of this appeal.

[16] Bieri Depo.at 7-8.

[17] *Id.*, Ex. 2 at 7.

[18] *Id.*, Ex. 2 at 8-9.

Dr. Bieri indicated that in providing his impairment rating, he utilized the range of motion model rather than the preferred DRE method. When asked, he testified that had he used the DRE model, the resulting combined impairment would be 12 percent to the body as a whole rather than the 16 percent contained within his report.[19] Dr. Bieri was also asked about claimant's task loss. He opined that claimant had lost either 6 of 25 tasks (Molski's list) or 7 of 35 (Terrill's list).

The ALJ adopted the findings of Dr. Bieri, the independent medical examiner, with respect to claimant's functional impairment. Claimant was granted an Award for 16 percent permanent partial impairment to the body as a whole and the Board affirms this finding.

The ALJ then considered the permanent partial general bodily disability, or what is also known as "work disability" which is defined at K.S.A. 1999 44-510e and provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.** Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

[19] *Id.* at 19-20.

This statute must be read in light of *Foulk*[20] and *Copeland*.[21] In *Foulk*, the Kansas Court of Appeals held a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to perform an accommodated job, which the employer had offered. And in *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon ability rather than actual wages when the worker failed to make a good faith effort to find appropriate employment after recovering from the work injury.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[22]

In this instance, the ALJ concluded that claimant failed to demonstrate good faith by refusing to participate in the vocational plan offered by respondent.[23]

> While claimant did attempt to return to work at IBP and did circulate employment applications, claimant's lack of education, inability to understand or write English and lack of job skills made it highly unlikely that claimant would obtain other employment. The number of job applications, while impressive in volume, stopped on October 10, 2002 and strikes the court as an effort on the part of the claimant to enhance his work disability claim rather than actually find a job.[24]

The Board agrees with the ALJ's analysis on the issue of good faith and his ultimate decision to impute a wage of $279.20 per week. Claimant certainly made every effort to obtain alternative employment with respondent but that effort was, in reality, unlikely to yield a job given his lack of seniority and his restrictions resulting from his accidental injuries. On balance, it would have been reasonable and prudent for claimant to have taken advantage of all opportunities including the chance to learn English. This would have only enhanced his likelihood of obtaining employment. Just like the ALJ, the Board concludes that the mere act of filling out applications does not, in and of itself under these facts and circumstances, constitute a good faith effort to find appropriate employment. Thus, the

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[20] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[21] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[22] *Id.* at 320.

[23] ALJ Award (Dec. 1, 2003) at 4.

[24] *Id.*

Board finds the ALJ properly imputed a post-injury wage of $279.20 per week.[25] The result is a 34 percent wage loss.

Turning to the task loss component of the statute, the Board finds the ALJ's determination that claimant sustained a 37.5 percent task loss. After reviewing the record as a whole, the Board affirms this finding as well as the ALJ's ultimate conclusion that claimant sustained a 35.75 percent work disability.

Respondent argues that work disability is not available to claimant as he returned to a regular duty job following his two separate accidents that resulted solely in two functional impairments.[26] The difficulty with this argument is the fact that claimant was reassigned each time following an injury to a different job so as to accommodate his permanent restrictions, including no repetitive activities.[27] By accommodating his restrictions, the respondent temporarily masked the claimant's work disability.[28] "When the accommodated worker leaves the confines of accommodated employment, the disability reemerges."[29] Under these facts, the Board rejects the respondent's argument.

All other findings are hereby adopted by the Appeals Board as is fully set forth herein to the extent they are not inconsistent with the above.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated December 1, 2003, is modified to reflect the stipulated average weekly wage, but affirmed in all other respects.

The claimant is entitled to 3.86 weeks of temporary total disability compensation at the rate of $280.48 per week or $1,082.65 followed by 148.36 weeks of permanent partial disability compensation at the rate of $280.48 per week or $41,612.01 for a 35.75% work disability, making a total award of $42,694.66, which is due, owing and ordered paid in one lump sum less amounts previously paid.

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[25] This is the only figure contained within the record with respect to claimant's capacity to earn wages and is consistent with the opinions expressed by both Dan Zumalt and Jim Molski.

[26] Respondent's Brief (filed Dec. 1, 2003) at 5 of the attachment.

[27] Eyster Depo., Ex. 2 at 1.

[28] *Tallman v. Case Corp.*, 31 Kan. App. 2d 1044, 77 P.3d 494 (2003).

[29] *Id*.

IT IS SO ORDERED.

Dated this _____ day of June 2004.

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BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

c: Stanley R. Ausemus, Attorney for Claimant
Gregory D. Worth, Attorney for Self-Insured Respondent
Brad E. Avery , Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director